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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	CC Docket No. 92-297
	)	
Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service;	)	RM-7872; RM-7722
	)	
Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules;	)	
	)	
Suite 12 Group Petition for Pioneer's Preference;	)	PP-22
	)	
University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial	)	

COMMENTS OF U S WEST, INC.

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March 16, 1993

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SUMMARY

U S WEST, Inc. ("U S WEST"), supports the proposal of the Federal Communications Commission ("FCC" or "Commission") to establish two new competitive "wireless cable" licenses in communities throughout the United States. The proposal set forth in the Notice of Proposed Rulemaking ("Notice") in this docket is fundamentally sound in all aspects, and U S WEST supports it. We do have comment on several specific areas.

First, we concur with the Commission's proposal that the technical characteristics of the service should be generally left to the marketplace and licensee judgment, subject to mandatory frequency coordination under the supervision of the FCC. While frequency coordination issues may become thorny in the future, there is no reason to suspect that licensees acting in good faith will not be able to resolve practically all such issues on their own, without advance regulatory strictures.

Second, applicants and licensees should be given the maximum flexibility to operate as either carriers or non-carriers, based upon the particulars of their own methods of operation. Jurisdictionally, it appears that most services provided by local multipoint distribution service (or "LMDS") licensees will be interstate in nature, and it will not be necessary for the FCC to exercise preemptive authority to carry out the federal policies set forth in the Notice. LMDS licensees who are classified as private land mobile radio services will also be immune from most

aspects of state regulation, even if they do provide intrastate carrier-like services.

Third, there is no regulatory, legal, or economic reason why telephone companies, such as U S WEST Communications, Inc., or their affiliates, should be in any way limited in their ability to participate in the provision of the local multipoint distribution services proposed in the Notice. As LMDS provides an entirely different service in a different economic market than currently served by such telephone companies, there is no reason to limit such telephone companies from full participation in LMDS service.

Fourth, any multiple ownership rules devised in this docket ought to be limited to preserving the separate legal identities and control of the two licensees within individual basic trading areas. There are many opportunities for cooperation among licensees, either within the same Basic Trading Area ("BTA") or in other BTAs, which could prove salutary and in the public interest.

Fifth, we agree with the requirement that an applicant propose to serve 90 percent of the population of a BTA. However, it is important that such service be measured objectively, using line of sight criteria.

Sixth, we agree that the lottery process should be used to select a licensee from among mutually exclusive applicants. In this regard, applicants ought to be required to specify in some detail their technical and financial proposals and be subject to

written discovery to further test the bona fides of their intent to construct and operate proposed stations.

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COMMENTS OF U S WEST, INC.

Comes now, U S WEST, Inc. ("USW" or "U S WEST"), through counsel, and files these comments in the above-captioned docket.

I. INTRODUCTION

In its Notice of Proposed Rulemaking, Order, Tentative Decision, and Order on Reconsideration ("Notice"),[1] the Federal Communications Commission ("Commission" or "FCC") proposes to allocate two bands of 1000 MHz of spectrum each in the 27.5 -

[1] See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, FCC 92-538, rel. Jan. 8, 1993.

29.5 GHz band for use by what are called local multipoint distribution services ("LMDS") operators. It is envisioned that these operators will initially provide competitive multichannel video delivery to customers, utilizing cellular and polarization techniques which permit usage of multiple low power transmitters to cover a wide range of territory. The Notice looks toward a competitive service with as much regulatory flexibility as is feasible, consistent with the FCC's licensing requirements and the common carrier and Cable Act restrictions of the Communications Act. The market would be the primary driver of how service would be provided in such key areas as price, type, quality, and quantity of service offered.

The proposals set forth in the Notice are salutary. As the Commission correctly observes, the proposed RF band for the new LMDS service is generally unused today, the proposed technology shows great promise, and there is clearly a market need for additional broadband delivery systems in most markets. The assignment of two bands of 1000 MHz each also is the most efficient way to enable licensees to have sufficient bandwidth for economic viability while further increasing diversity. Thus, U S WEST supports the proposals set forth in the Notice. We comment herewith on several items upon which specific comment is useful.

II. TECHNICAL ISSUES

Given the propagation characteristics of transmissions within the frequencies dealt with in the Notice, the FCC proposes

only very limited technical regulation of the proposed bands.[2] Comments are sought on what types of technical regulation might be necessary or appropriate. U S WEST concurs that it is neither necessary nor desirable to impose detailed technical requirements on the new service. Transmissions within the service bandwidth are unlikely to interfere with other radio transmissions. Regulation of such service-specific issues as channelization, modularity, and the like would be restrictive of creative service offerings and would serve no useful purpose. Power related rules (such as maximum power and antenna gain specifications) ought to be encompassed entirely in the minimum coverage and frequency coordination rules.

USW agrees with the position in the Notice that frequency coordination should be required, both among LMDS licensees and between LMDS licensees and other spectrum users such as mobile satellite providers or other terrestrial services which may share the allocated band or a portion of the band. Industry associations such as the National Spectrum Managers Association are the recognized expert groups and should be encouraged to develop coordination procedures which can be adopted (or simply accepted) by the Commission. By requiring frequency coordination similar to that mandated by Parts 21 and 25 of the FCC's rules, engineering and frequency coordination firms (and prospective licensees) will have ample motivation to develop the required software and methods to accomplish all necessary coordination.

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[2] See id. at ¶¶ 23-24.

The Commission should also act quickly to resolve any interference issues between the proposed LMDS service and satellite services. The scheduled launch of the NASA ACTS satellite in June of 1993 signals the commercialization of the Ka band in the 20 to 30 GHz range, with uplinks scheduled for 29 to 30 GHz. Commercial satellite use of the segment for 29.0 - 29.5 GHz may make satellite frequency coordination difficult in the upper 500 MHz of the proposed "B" LMDS band. There is very little information currently available on how such coordination would be accomplished, and the Commission must be ready to act if coordination problems threaten to disrupt "B" band service or commercial viability.

III. LICENSING/REGULATORY ISSUES/MULTIPLE OWNERSHIP

The Notice seeks comment on a variety of issues dealing with how the operation of the new service ought to be licensed and/or regulated. There are several significant questions raised in this section.

The Notice first proposes that LMDS licensees be given the option of choosing carrier or non-carrier status and seeks comment on the regulatory implications of such a choice. USW concurs that licensees should be given a choice between carrier and non-carrier status.[3] The Communications Act clearly

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[3] See id. at ¶¶ 25-26.

envisions the provision of non-carrier services by carriers,[4] and there is no reason why LMDS licensees should not be offered a similar choice. The election procedures set forth in 47 C.F.R. § 21.900 applicable to multichannel MDS applications are proposed for the new LMDS service.[5] Under these rules, applicants would notify the Commission of their carrier/non-carrier status at the time of filing their applications;[6] changes from carrier to non-carrier status after construction would be treated as a Section 214 discontinuance, subject to very limited rules;[7] and the normal carrier customer premises equipment rules would apply only to carriers.[8] A licensee initially selecting non-carrier status could become a carrier upon a simple FCC notification and the filing of any tariffs which might be necessary. This proposal appears eminently sensible.[9]

An applicant (or licensee) could opt for non-carrier status based upon one of several different possibilities. Initially, a licensee could choose to operate as a non-carrier, as opposed to conforming its conduct to traditional common carriage stan-

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[4]See Wold Communications, Inc. v. F.C.C., 735 F.2d 1465, 1475 (D.C. Cir. 1984).

[5]Notice at ¶ 26.

[6]47 C.F.R. § 21.900(c).

[7]47 C.F.R. § 21.910.

[8]47 C.F.R. § 64.702(b).

[9]Similarly, the enhanced services rules would apply only to licensees which had elected carrier status -- as enhanced services by definition are provided over common carrier facilities. 47 C.F.R. § 64.702(a).

dards.[10] In such event, the licensee's activities would be marked by individual contracts and specially designed services.[11] In other words, an LMDS operator not behaving like a common carrier need not be treated by the FCC as a common carrier.

Of course, state regulatory authorities still might be major factors in the event of a licensee choosing to act like a non-carrier, because interstate private carrier status is not inherently preemptive of state regulatory authority over intrastate services.[12] The Commission has, however, often included a preemptive ruling as part of a declaration that a given entity was a private carrier,[13] but the FCC would not have "automatic" preemption authority in the case of a private carrier which simply chose that status. However, it appears that most of the services to be offered by LMDS licensees will be interstate in nature,[14] enabling the FCC to achieve the same result as pre-emption by simply exercising its plenary jurisdiction over inter-state services. This type of non-carrier service provider would not be burdened with the regulatory strictures imposed upon non-

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[10]See Nat. Ass'n of Regulatory Utility Com'rs v. F.C.C., 525 F.2d 630, 640-46 (D.C. Cir.), cert. denied sub nom. Nat. Ass'n of Radio-Telephone Sys. v. F.C.C., 425 U.S. 992 (1976).

[11]See id.

[12]See Norlight, 2 FCC Rcd. 132, 135-36 ¶¶ 24-35 (1987), recon. denied, 2 FCC Rcd. 5167, 5168-69 ¶¶ 12-18 (1987).

[13]See Public Service Company of Oklahoma, 3 FCC Rcd. 2327, 2329-30 ¶¶ 22-26 (Chief, Private Radio Bureau, 1988).

[14]See Notice at ¶ 29.

carrier licensees in the Private Land Mobile Service, discussed below, whose exemption from state regulation is statutory.

A second method of obtaining non-carrier status is to obtain status as a private land mobile licensee. The Communications Act provides for unique regulatory treatment for licensees in what is called Private Land Mobile Service.[15] A private land mobile radio service is, by statutory fiat, "private," meaning that licensees have the full statutory ability to negotiate individual contracts with customers free of the "holding out" and non-discrimination rules applicable to common carriers.[16] This statutory authority to avoid common carrier regulation extends to state regulators as well,[17] who are prohibited from applying common carrier entry, exit, and rate regulations to intrastate private radio operations -- even if the licensee in fact behaves exactly like a carrier.[18] In other words, a private land mobile licensee retains its private carriage status, even at the inter-state level, regardless of whether it acts like a common carrier or not.

The Commission has thus far ruled that the test for whether a land mobile service is "private" for purposes of Section 332 of the Communications Act is whether it resells local exchange or

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[15]47 U.S.C. § 332 (1991).

[16]See 47 U.S.C. § 332(c)(2).

[17]See id. at § 332(c)(3).

[18]See id. at § 332(c)(1).

interexchange service.[19] This interpretation arose from earlier interconnection decisions holding that resale of carrier service would be inconsistent with private radio status,[20] and finds support (albeit ambiguous) in the statutory requirement that private radio customers order their own telephone service.[21] Under this analysis, an LMDS licensee could, with the blessing of the Commission, qualify for private land mobile status by simply not reselling local exchange service.

However, while a statutory private radio licensee may not resell carrier service for a profit and retain its private radio status,[22] the scope of the FCC's preemption authority under this section of the Communications Act is not unambiguous. It is not clear, for example, that the Commission may invoke the preemptive authority of Section 332 solely on the basis that the service of another carrier is not resold. Section 332 applies to "private land mobile service," and we can envision instances where an LMDS system would not be "private," even if it did not resell carrier service. Of course, the argument could also be made that LMDS service does not qualify under this statutory section because it is not "mobile."

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[19]See American Teltronix, 3 FCC Rcd. 5347-48 ¶¶ 6-7 (1988) ("American Teltronix").

[20]See Interconnection of Private Radio Systems, 89 F.C.C.2d 741, 753 n.15 (1982).

[21]See 47 U.S.C. § 332(c)(1).

[22]See American Teltronix, 3 FCC Rcd. at 5348 ¶ 9, wherein the Commission ruled instead that such resale could jeopardize the license, not the private radio status of the licensee itself.

Nevertheless, based on current precedent, we see no reason why LMDS applicants cannot choose to be either a traditional private carrier or a private land mobile carrier and accept the regulatory consequences of such choice. In either event, LMDS services appear to be almost entirely interstate in nature, and there ought to be no consequential jurisdictional conflicts with state regulators. If such conflicts do arise, they should be dealt with on the basis of the individual facts of the specific situation.

This section of the Notice also requests comment on whether LMDS service is covered under Section 11 of the Cable Consumer Protection Act of 1992 and whether cable television (or "CATV") operators would thereby be legally disqualified from obtaining licenses for LMDS systems.[23] Comment on the competitive implications of telephone company participation is also sought.[24] From the perspective of cable television operators, we frankly can see no material difference between the multichannel MDS systems treated in the statute and the LMDS systems at issue here. However, there does not appear to be any competitive reason to exclude CATV operators from obtaining LMDS licenses.

From the telephone company side, any competitive issues caused by telephone company ownership of LMDS facilities would be trivial. The concerns about telephone company participation in cable television service within a telephone serving area arose

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[23]See Notice at ¶ 34.

[24]See id. at n.12.

out of telephone company control over what was then essential pole and conduit space.[25] LMDS service uses no poles or conduits, and there is no reason at all to deny telephone companies the opportunity to participate in this new service. In fact, a telephone company providing LMDS service could bring substantial public benefits because of its unique experience in serving customers in a given area.[26]

IV. SERVICE AREAS AND COOPERATIVE AGREEMENTS

The Notice proposes to license LMDS systems to each of the 487 "Basic Trading Areas" ("BTA") defined in the Rand-McNally Atlas, but seeks comment on whether some other defined set of areas might be of a more appropriate size.[27] USW agrees with the Notice that BTAs represent an appropriate licensing/service area for LMDS. These areas are sufficiently large to permit economically viable service providers to enter and remain in business. There is no presumptive need for larger areas. The question of whether larger service areas might present better

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[25]See Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 3 FCC Rcd. 5849, 5849-51 ¶¶ 2-9 (1988).

[26]Because we view LMDS service as substantially different from traditional telephone service, telephone company LMDS service could be offered separate from regulated telephone company basic services. To the extent the telephone company desired to utilize its own LMDS service to expand its basic offerings, it could simply purchase such service (by imputation or otherwise) from the affiliated LMDS provider or integrated LMDS operator.

[27]See Notice at ¶¶ 30-31.

service opportunities ought to be left to the market, which can be accomplished simply by permitting market forces to operate. There should be no restriction on a single licensee owning multiple LMDS stations or multiple stations in adjacent BTAs. A licensee could expand to a larger service area by combining its operation with that of an adjoining provider. In this context, there should, at the very least, be no restriction on licensees serving adjacent BTAs entering into cooperative agreements regarding services, programming, or any other aspect of operation. If there are no multiple ownership restrictions, such agreements (falling below ownership) would obviously not be problematic. However, any restrictions should recognize the importance of this type of cooperative arrangement to expand coverage and service.

There are also areas where the two licensees serving the same BTA might desire to work together in offering service in a manner which would serve the public interest. Obvious examples would include sharing of transmission towers (and possibly transmission equipment) and sharing of receiver procurement and distribution costs (including distribution of receivers which receive all two GHz from both licensees). We submit that such agreements likewise ought to be permitted, and the only agreements between the two licensees in a single BTA which should merit FCC concern are those which would effectively undercut the separate control of the two licensees. All other agreements should be presumptively valid and be filed with the Commission only on specific request.

V. MINIMUM AREAS/POPULATION

The Notice proposes that a licensee must be able to provide service to at least 90 percent of the population within its selected BTA.[28] This requirement is reasonable if the service area is sufficiently small to make the commitment realistic and meaningful. Use of BTAs for the LMDS service area meets this test. Particularly, given the propagation characteristics in the LMDS bandwidth, however, the Commission should specify that service for this purpose means putting a particular signal level over the area. While an LMDS licensee obviously will try to optimize its service (the competitive nature of the market will ensure that), licensing issues cannot be dealt with based on customer perception of signal quality. For purposes of determining the compliance with the 90 percent rule for television services, the signal ought to be considered as complying with the rule if it delivers video quality levels to the end user measurable by an accepted standard, such as the five-point subjective video quality scale set forth in Report 564-3, CCIR, 1986.[29]

VI. SELECTION AMONG MUTUALLY EXCLUSIVE APPLICANTS AND APPLICATIONS

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[28] See id. at ¶ 32.

[29] Any measurement must, of course, be applied under line of sight conditions. Use of test points of signal quality around the area will enable a reasonable contour to be drawn.

The Notice requests comment on how selections ought to be made from among mutually exclusive applicants.[30] This issue implicates much of the rest of the regulatory/processing structure, because a selection procedure which is too rigorous can delay service (often interminably),[31] while one which is too lax can encourage filings by speculators with no intention of actually providing service to the public.[32] We submit that the optimal method of selection is one in which the selection process is simple, while the ability to participate in the selection process is limited to serious applicants. Recognizing that this goal can probably never be reached in a manner anywhere near perfection, we nevertheless offer some suggestions.

First, lottery selection appears to be the best way of proceeding with the actual choice of a licensee. The lottery method has the virtue of extreme simplicity. However, use of a lottery to select licensees means that the filing and processing of applications cannot be overly simplified -- and must be tailored so that only applicants interested in constructing and operating an LMDS station actually apply and are processed into the lottery.

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[30]See Notice at ¶¶ 35-36.

[31]See, e.g., the Commission discussion regarding the licensing mechanism to be used for Personal Communications Services, wherein it reviews some of the negative effects of the selection procedures used to date. Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd. 5676, 5687 ¶ 23, 5707 ¶ 82 (1992).

[32]See id. at 5708-9 ¶¶ 84-88, 5774 (Separate Statement of Commissioner James H. Quello), 5776 (Statement of Commissioner Sherrie P. Marshall).

Thus, the requirement that lottery participants submit applications which are "acceptable for filing" in order to participate ought to be vigorously enforced, and the Commission must still determine that an applicant is qualified and that the public interest will be served before granting a construction permit.[33]

Second, we agree that the diversity and minority preference provisions of the Communications Act apply to LMDS applications.[34] For diversity purposes, only holdings which include some modicum of program or content control should be counted -- common carrier operations must be excluded from any diversity analysis.[35]

Third, a "short form" or even postcard application would not be acceptable. Applicants should be required to demonstrate in a testable manner both their financial qualifications and their technical proposal. Interrogatories testing the bona fides of any application should also be permitted.[36] An actual evidentiary showing that an applicant is not qualified or did not make a bona fide application can be made if such an applicant is

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[33]47 U.S.C. § 309(a), (i) (1991).

[34]See id. at § 309(i)(3)(A).

[35]By definition, a carrier does not control the content of the message it carries. See, e.g., how the Commission handled channel control by cable systems regarding the provision of "wireless cable" service. Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 5 FCC Rcd. 6410, 6416-17 ¶¶ 41-42 (1990).

[36]The discovery procedures set forth in 47 C.F.R. §§ 65.103-104 for proceedings involving rate of return prescriptions would provide a meaningful discovery opportunity.

chosen in the lottery process. The Commission's proposal that applications must be "letter perfect" upon filing is also sensible.[37]

Fourth, the lottery process ought to include a substantial filing fee[38] and a meaningful financial showing, which would require either that a substantial percentage of construction and operational costs have been placed in an escrow account or that the applicant has a legally binding irrevocable letter of credit or loan commitment from a commercial bank. We recognize that meaningful financial requirements such as these could impose not insignificant costs on applicants, and thereby reduce the number of LMDS applicants. What is more, the financial flexibility of applicants could be reduced by tying up funds and credit. Such an approach nevertheless represents a reasonable method of ensuring that LMDS licenses are ultimately awarded to applicants filing in good faith who are most likely to build and operate systems.

Fifth, the Notice proposes to prohibit settlements among applicants and alienation of interests in an application.[39] The Notice also would require a successful applicant to actually construct a system and have it operational before any assignment can be made.[40] Extensions of time to construct are not

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[37]Notice at ¶ 43.

[38]See id. at ¶ 50.

[39]See id. at ¶¶ 38-39.

[40]See id. at ¶ 39.

contemplated.[41] These ideas are all designed to ensure that only serious applicants will be processed and considered for lottery selection, a goal which we agree is both salutary and quite important. However, several contrary matters are also self-evident:

- settlements among bona fide applicants can result in a stronger ultimate applicant/service provider than would be the case with any individual applicant
- settlements after selection can offer opportunities to bona fide applicants to participate in the provision of service which will improve the overall quality of service
- forcing a successful applicant to construct an inferior system by denying it the opportunity to bring additional partners into the operation, particularly from among other bona fide applicants, should be avoided whenever possible

In other words, too rigid adherence to the settlement, alienation, and construction rules as proposed, while achieving the public benefit of restricting the application process to bona fide applicants, could have an ultimately negative impact on service to the community of license. We submit that the best approach must focus on testing the legitimacy of an application before the applicant is able to participate in the lottery process or any settlement process. Thus, strict application standards should be enforced. But once an applicant is in fact deemed to be bona fide (and the applicant is indeed capable of

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[41] See id. at ¶ 48.

proceeding with construction) little good would seem to be accomplished by preventing such an applicant from selling or merging with other applicants -- before or after actual conduct of a lottery.

Respectfully submitted,

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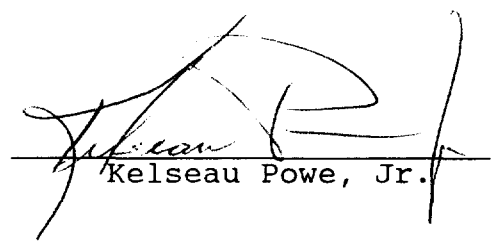
March 16, 1993

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify on this 16th day of March, 1993, that I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be hand delivered to the persons named on the attached service list.



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